PAROL CONTRACTS PRIOR TO ASSUMPSIT.

IT is generally agreed by the Continental writers that in early German law, from which our law comes, only real and formal contracts were binding. The same is unquestionably true of the English common law from the time of Edward III. to the introduction of Assumpsit towards the end of the fifteenth century. But Mr. Justice Holmes in his Common Law, 260–264, and again in his essay on Early English Equity, 1 L. Q. Rev. 171–173, endeavors to show that the rule requiring a *quid pro quo* for the validity of a parol undertaking was not of universal application in England, and that a surety, in particular, might bind himself without a specialty prior to the reign of Edward III. If this opinion is well-founded, an innovation and the abolition of the innovation must be accounted for. The evidence in favor of the validity during the two centuries following the Norman Conquest, of any parol obligation which was neither based upon a *quid pro quo*, nor assumed in a court of record, should, therefore, be very strong to carry conviction. The evidence thus far adduced has failed to convince the present writer.

Prior to the appearance of Assumpsit the contractual remedies in English law were Debt, Detinue, Account, and Convenant. Detinue and Account, every one will agree, were based upon real contracts. Covenant lay only upon sealed instruments, that is, formal contracts. If, therefore, parol undertakings, other than real contracts, were ever recognized in early English law they must have been enforced by the action of Debt. But no instance of such an action in the royal courts, it is believed, can be found.

Glanvil, Bracton, and Britton all recognize the validity of debts founded upon a specialty.[1] Glanvil also says in one place that no proof is admissible in the king's court, if the plaintiff relies solely upon *fidei læsio;* and in another that the king's court does not enforce "privatas conventiones de rebus dandis vel accipiendis in

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[1] Glanvil, Lib. X. c. 12. "De debitis laicorum quae debentur . . . de cartis debita continentibus." Bracton, f. 100, b. "Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere." 1 Nich. Britton, 157, 162.

vadium vel alias hujusmodi," unless made in that court, that is to say, unless they were contracts of record.[1] Bracton makes the statement that the king's court does not concern itself except occasionally *de gratia* with "stipulationes conventionales," which may be infinite in their variety.[2] The language of Fleta is most explicit against the validity of formless parol promises. "Oportet igitur ex hoc quod aliquis ex promissione teneatur ad solutionem, quod scriptura modum continens obligationis interveniat, nisi promissio illa in loco recordum habenti recognoscatur. Et non solum sufficiet scriptura, nisi sigilli munimine stipulantis roboretur cum testimonio fide dignorum." The same principle was expressed a few years later in a case in Y. B. 3 Ed. II. 78. The plaintiff counted in Debt on a grant for £200, showing a specialty as to £140, and offering suit as to the rest. Frisk, for defendant, said: "Every grant and every demand by reason of grant must be by specialty, but of other contracts,[3] as of bailment or loan, one may demand by suit. Therefore as you demand this debt by reason of grant and show no specialty but of part, judgment," etc. The plaintiff

[1] Glanvil. Lib. X. c. 12, and c. 18.

[2] Bracton, f. 100, a. As there are several cases in Bracton's Note Book, in which the validity of covenants affecting land are assumed to be valid, Bracton, in the passage just referred to, probably had in mind miscellaneous covenants. See Pollock, Contracts (6 ed.), 136. It is certainly true that the rule that any promise under seal may give rise to an action was a comparatively late development in the history of covenant. As late as the middle of the fourteenth century, Sharshull, J., said in Y. B. 21 Ed. III. 7-20: "If he granted to you to be with you at your love-day, and afterwards would not come, perhaps you might have had a writ of covenant against him if you had a specialty to prove your claim."

[3] The word contract was used in the time of the Year Books in a much narrower sense than that of to-day. It was applied only to those transactions where the duty arose from the receipt of a *quid pro quo*, *e. g.*, a sale or loan. In other words, contract meant what we now mean by "real contract." What we now call the formal or specialty contract was anciently described as a grant, an obligation, a covenant, but not as a contract. See, in addition to the authorities cited in the text, Y. B. 17 Ed. III. 48-14. A count in debt demanding "part by obligation and part by contract." Y. B. 29 Ed. III. 25, 26, "Now you have founded wholly upon the grant, which cannot be maintained without a specialty, for it lies wholly in parol, and there is no mention of a preceding contract." Y. B. 41 Ed. III. 7-15. Thorp, C. J.: "You say truly if he put forward an obligation of the debt, but if you count upon a contract without obligation, as here (a loan), it is a good plea." Y. B. 43 Ed. III. 2-5. Debt on a judgment. *Belknap* objected "for there is no contract or covenant between them." 8 Rich. II. Bellewe (ed. 1869), 32, 111. "In debt upon contract the plaintiff shall shew in his count for what cause the defendant became his debtor. Otherwise in debt upon obligation." Y. B. 11 Hen. IV. 73, a-11; 19 Rich. II. Bellewe (ed. 1869), 32, 111; Y. B. 39 Hen. VI. 34-44; Sharington *v.* Strotton, Plowd. 298, 301, 302; Co. Lit. 292 *b*. The fanciful etymology given in Co. Lit. 47 *b* should be added: "In every contract there must be *quid pro quo* for *contractus est quasi actus contra actum.*"

was nonsuited. In Y. B. 2 Ed. III. 4–5, Aldeburgh (Judge of C. B. four years later) said: "If one binds oneself to another in a debt in presence of people 'sans cause et sans especialtie,' never shall an action arise from this." The same doctrine is repeated in later cases in the fourteenth century.[1] In the light of these authorities it seems highly improbable that Debt was ever maintainable in the king's court, unless the plaintiff could show either a specialty or a *quid pro quo* received by the defendant.[2]

In the essay upon "Early English Equity," already referred to, the distinguished writer makes the further suggestion that, although the formless parol undertakings ultimately failed of recognition in the King's Courts, the Church for a long time, with varying success, claimed a general jurisdiction in cases of *læsio fidei;* and that after the Church was finally cut down to marriages and wills, the clerical Chancellors asserted for a time in Chancery the power of enforcing parol agreements, for which the ordinary King's courts afforded no remedy. It is believed that undue importance has been attached to the proceedings in the spiritual court for *læsio fidei.* It is doubtless true that this court was eager to enlarge its jurisdiction, and to deal with cases of breach of faith not properly within its cognizance. We may also concede that the court was sometimes successful in keeping control of such cases when the defendant did not dispute the jurisdiction. But the authorities would seem to make it clear that from the time of the Constitutions of Clarendon, a prohibition would issue as a matter of course from the King's Court upon the application of one who was drawn into the spiritual court upon breach of faith in a purely temporal matter.[3]

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[1] Y. B. 11 & 12 Ed. III. 587; Y. B. 18 Ed. III. 13–7; Y. B. 44 Ed. III. 21, 23; Y. B. 9 Hen. V. 14–23. The only statement in the Year Books to the contrary is the *dictum* of Candish, J., in 48 Ed. III. 6–11: "And also this action of covenant of necessity is maintainable because for so slight a thing one cannot always have his clerk to make a specialty." The case in Y. B. 7 Ed. II. 242 can hardly be said to throw any light upon the question under discussion.

[2] By the custom of London and Bristol, Debt was allowed upon a parol grant without *quid pro quo.* Y. B. 43 Ed. III. 11–1; Y. B. 14 Hen. IV. 26–13; Y. B. 22 Ed. IV. 2–6; F. M. *v.* R. C., 1 M. & G. 6 n. (a.); Y. B. 38 Hen. VI. 29–12; Y. B. 1 Hen. VII. 22–12; Williams *v.* Gibbs, 5. A. & E. 208; Bruce *v.* Waite, 1 M. & G. 1, and cases cited in Pollock, Cont. (6 ed.), 138 n. (p.). See also the cases of parol undertakings in the Bishop of Ely's Court, 4 Seld. Socy. 114–118.

[3] Constitutions of Clarendon, c. 15, Stubbs, Sel. Chart. 134; Glanvil, Book X. c. 12; Abb. Pl. 31, col. 1, rot. 21 (1200); 2 Br. N. B. No. 50 (1219); Fitz. Abr. Prohib. 15 (1220); 2 Br. N. B. No. 1893 (1227); Stat. Circumspecte Agatis, 13 Ed. I.; Y. B. 22 Lib. Ass. 70; Y. B. 2 Hen. IV. 10–45; Y. B. 11 Hen. IV. 88–40; Y. B. 38 Hen. VI. 29–

Nor has the present writer been able to discover any traceable connection between the ecclesiastical claim of jurisdiction over *læsio fidei* and the jurisdiction of the Chancellor in the matter of parol agreements. If the Chancellor proceeded in the same spirit as the ecclesiastical judge, purely upon the ground of breach of faith, it would follow that in the absence of a remedy at common law, equity would give relief upon any and all agreements, even upon gratuitous parol promises. And Mr. Justice Holmes seems to have so interpreted the following statement, which he cites from the Diversity of Courts (Chancery): "A man shall have remedy in Chancery for covenants made without specialty, if the party have sufficient witness to prove the covenants, and yet he is without remedy at the common law;" for he adds that the contrary was soon afterwards decided, citing Cary, 7: "Upon *nudum pactum* there ought to be no more help in Chancery than there is at the common law." But, with all deference, the passage in the Diversity of Courts seems to have been misapprehended. There is really no contrariety between that passage and the extract from Cary. It is not asserted in the Diversity of Courts that one should have remedy for *all* parol covenants, where there was no remedy at common law. Full effect is given to the language used if it is taken to import that relief was given upon *some* parol covenants. So interpreted the Diversity of Courts accords with other authorities. For while it is confidently submitted that no instance can be found prior to the time of Lord Eldon[1] in which Equity gave relief upon a gratuitous parol promise, it is certainly true that Chancery did in some cases furnish a remedy upon parol covenants. But in all these Chancery cases it will be found that the promisee, acting in reliance upon the promise, had incurred expense, or otherwise parted with property, and that the Chancellor, upon an obvious principle of natural justice, compelled the promisor to make reparation for the loss caused by

11; Y. B. 20 Ed. IV. 10–9; Y. B. 22 Ed. IV. 20–47; Y. B. 12 Hen. VII. 22, b–2; Dr. & St. Dial. II. c. 24.

[1] At the present day a gratuitous undertaking by the owner of property to hold the same in trust for another is enforced in equity. It is a singular fact that this anomalous doctrine seems to have been first sanctioned by the conservative Lord Eldon, in *Ex parte* Pye, 18 Ves. 140. It was well settled that a use could not be created by a similar gratuitous parol declaration. Indeed, as late as 1855, Lord Cranworth, in Scales *v.* Maude, 6 D. M. & G. 43, 51, said that a mere declaration of trust by the owner of property in favor of a volunteer was inoperative. In Jones *v.* Lock, 1 Ch. Ap. 25, 28, he corrected this statement, yielding to the authority of what seemed to him unfortunate decisions.

his breach of promise. Three such instances, between 1377 and 1468, are mentioned in an essay upon "The History of Assumpsit," in an earlier volume of the REVIEW.[1] Those instances might have been supplemented by three similar cases which were brought to light by Mr. S. R. Bird.[2] In Gardyner *v.* Keche (1452–1454), Margaret and Alice Gardyner promised to pay the defendant £22, who on his part was to take Alice to wife. The defendant, after receiving the £22, "meaning but craft and disceyt," married another woman, "to the great disceyt of the said suppliants, and ageyne all good reason and conscience." The defendant was compelled to answer the bill. In Leinster *v.* Narborough (circa 1480), the defendant being betrothed to the plaintiff's daughter-in-law, but desiring to go to Padua to study law, requested the plaintiff to maintain his *fiancée*, and a maid-servant to attend upon her during his absence, and promised to repay upon his return all costs and charges incurred by the plaintiff in that behalf. The defendant returning after ten years declined to fulfil his promise, and the plaintiff filed his bill for reimbursement, and was successful.[3] In James *v.* Morgan (1504–1515), the defendant promised the plaintiff 100 marks if he would marry his daughter Elizabeth. The plaintiff accordingly "resorted to the said Elizabeth to his great costs and charges," and "thorow the desavebull comforde" of the defendant and his daughter delivered to the latter jewels, ribbons, and many other small tokens. Elizabeth having married another man through the "crafty and false meane" of the defendant, the plaintiff by his bill sought to recover the value of his tokens, and also the "gret costs and charges thorow his manyfold journeys."

In all these cases there was, it is true, a breach of promise. But there seems to be no reason to suppose that the Chancellors, in giving relief, were influenced, even unconsciously, by any recollection of ecclesiastical traditions in regard to *læsio fidei*. It was so obviously just that one who had intentionally misled another to his detriment should make good the loss, that we need not go further afield for an explanation of the Chancellor's readiness to give a remedy upon such parol agreements. In A little Treatise concerning Writs of Subpœna,[4] written shortly after 1523, — that

[1] 2 HARV. LAW REV., 14, 15.

[2] The Antiquary, Vol. IV. p. 185, reprinted in part in 3 Green Bag, 3.

[3] The Antiquary, Vol. V. p. 38.

[4] Doct. & St. (18th ed.), Appendix. 17; Harg. L. Tr. 334.

is, at about the same time as the Diversity of Courts, — occurs the following instructive passage: —

"There is a maxim in the law that a rent, a common, annuity, and such other things as lie not in manual occupation, may not have commencement, nor be granted to none other without writing. And thereupon it followeth, that if a man for a certain sum of money sell another forty pounds of rent yearly, to be percepted of his lands in D, &c., and the buyer, thinking that the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at the common law for lack of a deed; and therefore inasmuch as he that sold the rent hath *quid pro quo*, the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion, without any recompense, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna. But if he that made the sale of the rent had gone farther, and said that he, before a certain day, would make a sufficient grant of the rent, and after refused to do it, there an action upon the case should lie against him at the common law; but if he made no such promise at the making of the contract, then he that bought the rent hath no remedy but by subpœna, as it is said before."

Here the subpœna is allowed in the absence of a promise. There could, therefore, be no question of breach of faith. But the money having been paid and received under the expectation of both parties that the plaintiff would get a valid transfer of the rent, it was plainly just that equity should not permit the defendant to rely on the absence of a remedy at common law as a means of enriching himself at the expense of the plaintiff.

It is hardly necessary to remind the learned reader of the analogy between the case just considered, and uses arising upon a bargain and sale, which were supported for the first time only a few years before.[1] It was doubtless the same principle of preventing unjust enrichment which led the Chancellor in the reign of Henry V. to give a legal sanction to the duty of the feoffee to uses which before that time had been a purely honorary obligation.

To sum up, then, the Ecclesiastical Court had no jurisdiction over agreements relating to temporal matters. Chancery gave relief upon parol agreements only upon the ground of compelling reparation for what was regarded as a tort to the plaintiff, or upon the principle of preventing the unjust enrichment of the defendant;

[1] Y. B. 21 Hen. VII. 18–30.

and the common law, prior to Assumpsit, recognized only those parol contracts which were based upon a *quid pro quo.*

The jurisdiction of Equity was rarely invoked upon breaches of promises after the development of Assumpsit, unless specific performance of the contract was desired. We have only to consider, therefore, the nature of the common-law real contracts which were enforced by the actions of Debt, Detinue, and Account.

It is not necessary to deal specially with Account, since the essential principles of that action have been clearly and fully set forth by Professor Langdell in the second volume of this REVIEW.[1] It will suffice to emphasize the fact that a defendant's duty to account, whether as bailiff or receiver, arose from his receipt of property as a trustee, and that a plaintiff entitled to an account was strictly a *cestui que trust.* In other words, trusts for the payment of money were enforced at common law long before Chancery gave effect to trusts of land. It need not surprise us, therefore, to find that upon the delivery of money by A to B to the use of C, or to be delivered to C, C might maintain an action of Account against B.[2] Account against a receiver was long ago superseded by the common count for money had and received by the defendant to the use of the plaintiff. But the words "to the use of" still bear witness to the trust relation.

Detinue was usually founded upon the contract of bailment. This contract was a real contract by reason of the delivery of a chattel by the bailor to the bailee. The duty of the bailee was commonly to redeliver the same chattel to the bailor, either upon demand or at some time fixed by the terms of the bailment. But the chattel might be delivered to the bailee to be delivered to a third person, in which case the third person was allowed to maintain Detinue against the bailee.[3]

Detinue would also lie against a seller upon a bargain and sale. Here it was the payment of the purchase-money that as a rule

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[1] Pages 242–257. See also Pollock, Cont. (6th ed.), 137, and the observations of the same writer in 6 HARV. LAW REV., 401, 402.

[2] (32 Ed. III.) Fitz. Ab. Acct. 108; (2 Rich. II.) Bellewe Acct. 7; Y. B. 41 Ed. III. 10–5; Y. B. 6 Hen. IV. 7–33; Y. B. 1 Hen. V. 11–21; Y. B. 36 Hen. VI. 9, 10–5; Y. B. 18 Ed. IV. 23–5; Y. B. 1 Ed. V. 2–2; Robsert *v.* Andrews, Cro. El. 82; Huntley *v.* Griffith, Gold. 159; Harrington *v.* Rotheram, Hob. 36, Brownl. 26 s. c.; Clark's Case, Godb. 210, pl. 299. See also Ames, Cases on Trusts (2d ed.), 1 n. 3, 4 n. 1.

[3] Y. B. 34 Ed. I. 239; Y. B. 12 & 13 Ed. III. 244; Y. B. 39 Ed. III. 17, A; Y. B. 3 Hen. VI. 43–20: Y. B. 9 Hen. VI. 38–13; Y. B. 9 Hen. VI. 60, A–8; Y. B. 18 Hen. VI. 9, A–7, and other authorities cited in Ames, Cases on Trusts (2d ed.), 52 n. 1.

constituted the *quid pro quo* for the seller's duty to suffer the buyer to take possession of the chattel sold. If the bargain was for the reciprocal exchange of chattels, the delivery of the chattel by the one party would be as effective a *quid pro quo* as payment of purchase-money to support an action of Detinue against the other party. It was hardly an extension of principle to treat the delivery of the buyer's sealed obligation for the amount of the purchase-money as equivalent to actual payment of money, or delivery of a chattel, and accordingly we find in Y. B. 21 Edward III. 12–2, the following statement by Thorpe (Chief Justice of the Common Bench in 30 Edward III.): "If I make you an obligation for £40 for certain merchandise bought of you, and you will not deliver the merchandise, I cannot justify the detainer of the money; but you shall recover by a writ of Debt against me, and I shall be put to my action against you for the thing bought by a writ of Detinue of chattels." But it was a radical departure from established traditions to permit a buyer to sue in Detinue when there was merely a parol bargain of sale without the delivery of a physical *res* of any sort to the seller. But this striking change had been accomplished by the time of Henry VI. The new doctrine may be even older, but there seems to be no earlier expression of it in the books than the following statement by Fortescue, C. J.: "If I buy a horse of you, the property is straightway in me, and for this you shall have a writ of Debt for the money, and I shall have Detinue for the horse on this bargain."[1] From the mutuality of the obligations growing out of the parol bargain without more, one might be tempted to believe that the English law had developed the consensual contract more than a century before the earliest reported case of Assumpsit upon mutual promises.[2] But this would be a misconception. The right of the buyer to maintain Detinue, and the corresponding right of the seller to sue in Debt were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants, — each party's grant of a right forming the *quid pro quo* for the corresponding duty of the other.[3]

[1] Y. B. 20 Hen. VI. 35–4; Y. B. 21 Hen. VI. 55–12. See, to the same effect, Y. B. 37 Hen. VI. 8–18, per Prisot, C. J.; Y. B. 49 Hen. VI. 18–23, per Choke, J., and Brian; Y. B. 17 Ed. IV. 1–23. See also Blackburn, Contract of Sale, 190–196.

[2] Peck *v.* Redman (1555), Dy. 113, appears to be the earliest case of mutual promises.

[3] If the bargain was for the sale of land and there was no livery of seisin, the buyer had no common-law remedy for the recovery of the land, like that of Detinue for chattels. Equity, however, near the beginning of the sixteenth century, supplied the com-

It remains to consider the most prominent of all the English real contracts, the simple contract debt. The writ in Debt, like writs for the recovery of land, was a *praecipe quod reddat.* The judgment for the plaintiff is that he recover his debt. In other words, as in the case of real actions, the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep, but ought to surrender. This doubtless explains why the duty of a debtor was always for the payment of a definite amount of money or a fixed quantity of chattels.[1] A promise to pay as much as certain goods or services were worth would never support a count in Debt.[2] In Y. B. 12 Edw. IV. 9–22, Brian, C. J., said: "If I bring cloth to a tailor to have a cloak made, if the price is not determined beforehand that I shall pay for the making, he shall not have an action of Debt against me."[3] For the same reason, the *quantum meruit* and *quantum valebant* counts seem never to have gained a footing among the common counts in Debt, and in Assumpsit the *quantum meruit* and *quantum valebant* counts were distinguished from the *indebitatus* counts. But principle afterwards yielded so far to convenience that it became the practice to declare in *Indebitatus Assumpsit* when no price had been fixed by the parties, the verdict

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mon-law defect by compelling the seller to hold the land to the use of the buyer, if the latter had either paid or agreed to pay the purchase-money. Br. Ab. Feoff. al Use, 54; Barker *v.* Keate, 1 Freem. 249, 2 Mod. 249 s. c.; Gilbert, Uses, 52; 2 Sand. Uses, 57. The consideration essential to give the buyer the use of land was, therefore, identical with the *quid pro quo* which enabled him to maintain Detinue for a chattel Inasmuch as the consideration for parol uses was thus clearly borrowed from the common-law doctrine of *quid pro quo*, it seems in the highest degree improbable that the consideration for an *Assumpsit* was borrowed by the Common Law from Equity. 2 HARV. L. REV. 18, 19. But see Salmond, Essays in Jurisprudence, 213.

[1] A debtor might as easily owe chattels as money. A debt of chattels would arise from the same *quid pro quo* as a debt of money. A lessee might accordingly be charged in debt for chattels by the lessor. Y. B. 20 and 21 Ed. I. 139; Y. B. 50 Ed. III. 16–8. Y. B. 34 Hen. VI. 12–23; Anon. 3 Leon. 260; Denny *v.* Parnell, 1 Roll. Ab. 591, pl. 1. Or an employer by his employee. Y. B. 7 Ed. III. 12–2; Weaver *v.* Best, Winch. 75. Or a vendor by his vendee. Y. B. 34 Ed. I. 150; Y. B. 27 Hen. VII. 8–20. As *Indebitatus Assumpsit* would lie for a debt payable in money, it was also an appropriate remedy for a debt payable in chattels. Cock *v.* Vivyan, 2 Barnard, 293, 384; Falmouth *v.* Penrose, 6 B. & C. 385; Mayor *v.* Clerk, 4 B. & Al. 268. The judgment in Debt for Chattels was like that in Detinue that the plaintiff recover his chattels. The essential distinction between Detinue and Debt for chattels seems to be this, — Detinue was the proper remedy for the recovery of a specific chattel, Debt, on the other hand, for the recovery or a specific amount of unascertained chattels.

[2] Johnson *v.* Morgan, Cro. El. 758.

[3] See to the same effect Y. B. 3 Hen. VI. 36–33; Anon., 2 Show. 183; Young *v.* Ashburnham, 3 Leon. 161; Mason *v.* Welland, Skin. 238, 242.

of the jury being treated as equivalent to a determination of the parties at the time of bargain.

The ancient conception of a creditor's claim in Debt as analogous to a real right manifested itself in the rule that a plaintiff must prove at the trial the precise amount to be due which he demanded in his *præcipe quod reddat.* If he demanded a debt of £20 and proved a debt of £19, he failed as effectually as if he had declared in Detinue for the recovery of a horse and could prove only the detention of a cow.[1] For the same reasons Debt would not lie for money payable by instalments, until the time of payment of the last instalment had elapsed, the whole amount to be paid being regarded as an entire sum, or single thing.[2]

The *quid pro quo* which the debtor must receive to create his duty might consist of anything that the law could regard as a substantial benefit to him. Debts were usually founded upon a loan of money, a sale, a lease of property to the debtor, or upon work and labor performed for him. The *quid pro quo* in all these cases is obvious.[3] The execution of a release by an obligee to an obligor was also a sufficient *quid pro quo* to create a new debt between the same parties.[4] Forbearance to sue on a claim has been regarded in the same light: "for the forbearing of a suit is as beneficial in saving, as some other things would have been in gaining."[5]

But Debt will not lie upon mutual promises. In Smith *v.* Airey[6] Holt, C. J., said that "winning money at play did not raise a debt, nor was debt ever brought for money won at play, and an

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[1] Y. B. 3 Hen. VI. 4–4; Y. B. 11 Hen. VI. 5–9; Y. B. 21 Ed. IV. 22–2; Smith *v.* Vow, Moore, 298; Bagnall *v.* Sacheverell, Cro. El. 292; Bladwell *v.* Stiglin, Dy. 219; Baylis *v.* Hughes, Cro. Car. 137; Calthrop *v.* Allen, Hetl. 119; Ramsden's Case, Clayt. 87; Hooper *v.* Shepard, 2 Stra. 1089; Hulme *v.* Sanders, 2 Lev. 4. In Vaux *v.* Mainwaring, Fort. 197, 1 Show. 215 s. c., the distinction was taken that in *Indebitatus Assumpsit* the plaintiff might recover the amount proved, but in Debt the amount stated in the writ or nothing. But afterwards the plaintiff was not held to a proof of the amount stated in the writ even in Debt. Aylett *v.* Lowe, 2 W. Bl. 1221; Walker *v.* Witter, Doug. 6; M'Quillin *v.* Cox, 1 H. Bl. 249; Lord *v.* Houston, 11 East, 62. See also Parker *v.* Bristol Co., 6 Ex. 706, per Pollock, C. B., and 1 Chitty, P. (7th Ed.) 127–128.

[2] Rudder *v.* Price, 1 H. Bl. 547.

[3] If a bargain was for the sale of unascertained chattels, the transaction gave rise to mutual debts, the reciprocal grants of the right to a sum certain of money and a fixed amount of chattels forming the *quid pro quo* for the corresponding debts. Y. B. 21 Hen. VI. 55–12; Anon. Dy. 30, pl. 301; Slade's Case, 4 Rep. 94 b. See *supra*, p. 259.

[4] Y. B. 12 Hen. IV. 17–13.

[5] Bidwell *v* Catton, Hob. 216.

[6] 2 Ld. Ray. 1034, 6 Mod. 128, Holt, 329 s. c.

Indebitatus Assumpsit would not lie for it; but the only ground of the action in such cases was the mutual promises. That though there were a promise, yet Debt would not lie upon that." According to another report of the same case Lord Holt said, "There is no way in the world to recover money won at play but by special Assumpsit." [1]

Originally there was no *quid pro quo* to create a debt against a defendant if the benefit was conferred upon a third person, although at the defendant's request. Y. B. 9 Henry V. 14-23 is a case in point. The plaintiff, having a claim for £10 against T, released the claim upon the defendant's promise to pay him the same amount. The plaintiff failed because the benefit of the release was received by T.[2] In Y. B. 27 Henry VIII. 23, upon similar facts, Fitz-James, C. J., thought the plaintiff should recover in an action on the case upon the promise, but not in Debt, "for there is no contract,[3] nor has the defendant *quid pro quo*. Post, J., and Spelman, J., on the other hand, thought there was a *quid pro quo*. It was also made a question, on the same ground, whether a defendant who promised money to the plaintiff if he would marry the defendant's daughter was liable in Debt to the plaintiff who married the daughter.[4] But here, too, the opinion finally prevailed that though the girl got the husband, her father did receive a substantial benefit.[5] In Y. B. 37 Henry VI. 9-18, Moyle, J., said: "If I say to a Surgeon that if he will go to one J who is ill, and give him medicine and make him safe and sound, he shall have 100 shillings, now if the Surgeon gives J the medicines and makes him safe and sound, he shall have a good action [Debt] against me for the 100 shillings, and still the thing is to another and not to the defendant himself, and so he has not *quid pro quo*, but

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[1] Walker *v.* Walker, Holt, 328, 5 Mod. 13, Comb. 303 s. c. Per Holt, C. J., "This is merely a wager and no *Indebitatus Assumpsit* lies for it; for to make that lie, there must be a work done, or some meritorious action for which Debt lieth." Hard's case, 1 Salk 23; Bovey *v.* Castleman, 1 Ld. Ray. 69. Per Curiam: "For mutual promises *Assumpsit* may lie, but not *Indebitatus Assumpsit*." These statements that Debt will not lie upon mutual promises bring out with great clearness the distinction already referred to between mutual promises and the mutual duties growing out of a parol bargain and sale. See Pollock, Contracts in Early English Law, 6 HARV. L. REV. 398, 399.

[2] The true ground of this decision seems sometimes to have been misunderstood. Holmes, Common Law, 267.

[3] After Assumpsit came in, it was many years before it was called a contract. That term was still confined to transactions resting upon a *quid pro quo*. See 2 HARV. L. REV. 15, and Jenks, Doctrine of Consideration, 134.

[4] Y. B. 37 Hen. VI. 8-18; Y. B. 15 Ed. IV. 32-14; Y. B. 20 Ed. IV. 3-17.

[5] Applethwaite *v.* Northby, Cro. El. 29; Beresford *v.* Woodroff, 1 Rolle, R. 433.

the same in effect." This reasoning of Moyle, J., met with general favor, and it became a settled rule that whatever would constitute a *quid pro quo*, if rendered to the defendant himself, would be none the less a *quid pro quo*, though furnished to a third person, provided that it was furnished at the defendant's request, and that the third person incurred no liability therefor to the plaintiff. Accordingly, a father was liable for physic provided for his daughter;[1] a mother for board furnished to her son;[2] a woman was charged in Debt by a tailor for embroidering a gown for her daughter's maid;[3] a defendant was liable for instruction given at his request to the children of a stranger, or for marrying a poor virgin.[4] The common count for money paid by the plaintiff to another at the defendant's request is another familiar illustration of the rule.

But it is an indispensable condition of the defendant's liability in Debt in cases where another person received the actual benefit, that this other person should not himself be liable to the plaintiff for the benefit received. For in that event the third person would be the debtor, and one *quid pro quo* cannot give rise to two distinct debts.[5] Accordingly where the plaintiff declared in Debt against A for money *lent* to B at A's request, his declaration was adjudged bad; for a loan to B necessarily implied that B was the debtor. If B was, in truth, the debtor, the plaintiff should have declared in Special Assumpsit against A on the collateral promise. If B was not the debtor, the count against A should have been for money *paid* to B at A's request.[6] By the same reasoning it would be improper to count against A for goods *sold* to B at A's request. If B was really the buyer, A should charge him in debt, and A in Special Assumpsit on the collateral promise. If B was not the buyer, the count against A should be for goods *delivered* to B at A's request.[7] The same distinction holds good as to services ren-

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[1] Stonehouse *v.* Bodvil, T. Ray. 67, 1 Keb. 439, s. c.

[2] Bret *v.* J. S., Cro. El. 756.

[3] Shandois *v.* Stinson, Cro. El. 880.

[4] Harris *v.* Finch, Al. 6.

[5] "There cannot be a double debt upon a single loan." *Per Curiam*, in Marriott *v.* Lister, 2 Wils. 141, 142.

[6] "If it had been an *Indebitatus Assumpsit* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt and not his son's; but when the money is lent to the son, 't is his proper debt, and not the father's." Per Holt, C. J., in Butcher *v.* Andrews, Carth. 446 (Salk. 23; Comb. 473, s. c.). See also Marriott *v.* Lister, 2 Wils. 141.

[7] Y. B. 27 Hen. VIII. 25-3, per Fitz James, C. J.; Hinson *v.* Burridge, Moore, 701; Cogan *v.* Green, 1 Roll. Ab. 594; Anon., 1 Vent. 293; Stonehouse *v.* Bodvil, 1 Keb. 439;

dered to B at A's request. If B is a debtor A is not, but only collaterally liable in Assumpsit.[1]

The distinction between Debt and Special Assumpsit, as illustrated in the cases mentioned in the preceding paragraph, is of practical value in determining whether a promise is in certain cases within the Statute of Frauds relating to guaranties. If B gets the enjoyment of the benefit furnished by the plaintiff at A's request, but A is the only party liable to the plaintiff, A's promise is not within the statute. If, on the other hand, B is liable to the plaintiff for the benefit received, that is, is a debtor, A's promise is clearly a guaranty and within the statute.[2]

There were obviously many parol agreements that did not come within the scope of Debt, Detinue, or Account. This difficulty was at length met by the action of *Assumpsit*, which became, indeed, a remedy upon all parol agreements.[3] But the distinction between Debt and Assumpsit is fundamental. For, while Assumpsit might always be brought where Debt would lie upon a simple contract, the converse is not true. There were many cases where Assumpsit was the only remedy. *Assumpsit* would lie both where the plaintiff had incurred a detriment upon the faith of the defendant's promise, and where the defendant had received a benefit. Debt would lie only in the latter class of cases. In other words, Debt could be brought only upon a real contract, — Assumpsit upon any parol contract.

J. B. Ames.

Hart *v.* Langfitt, 2 Ld. Ray. 841, 842, 7 Mod. 148 s. c.; Rozer *v.* Rozer, 2 Vent. 36, overruling Kent *v.* Derby, 1 Vent. 311, 3 Keb. 756, s. c.

[1] Alford *v.* Eglisfield, Dy. 230, pl. 56; Baxter *v.* Reed, Dy. 272 n. (32); Nelson's Case, Cro. El. 880 (cited); Trevilian *v.* Sands, Cro. Car. 107, 193, 1 Roll. Ab. 594, pl. 14. A was the debtor and B was not liable in Woodhouse *v.* Bradford, 2 Rolle R. 76, Cro. Jas. 520 s. c.; Hart *v.* Langfitt, 2 Ld. Ray. 841, 7 Mod. 145 s. c.; Jordan *v.* Tompkins, 2 Ld. Ray. 982, 6 Mod. 77 s. c.; Gordon *v.* Martin, Fitzg. 302; Ambrose *v.* Roe, Skin. 217, 2 Show. 42 s. c.

[2] Watkins *v.* Perkins, 1 Ld. Ray. 224; Buckmyr *v.* Darnell, 2 Ld. Ray. 1085, 3 Salk. 15 s. c.; Jones *v.* Cooper, Cowp. 227; Matson *v.* Wharam, 2 T. R. 80.

[3] For an account of the development of Assumpsit see 2 HARV. L. REV. 1–19, 53–69.